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NUMBER

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991

THOMAS J. CUDA AND CLAUDIA S. CUDA,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Should the United States Court of Appeals for the Sixth Circuit have affirmed the decision of the United States District Court for the Western District of Michigan, Southern Division, in granting a Motion for Summary Judgment and finding, as a matter of law, the disclosure of income tax information in the Notices of Levy were necessary without any evidence or allegations to support that finding?

II

Did the District Court err in considering the Defendant/Respondent's Motion as a Summary Judgment Motion without giving the Plaintiffs/Petitioners opportunity for Discovery?

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SUPREME COURT OF THE UNITED STATES

THOMAS J. CUDA AND
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Petitioners

No.

vs.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Thomas J. Cuda and Claudia S. Cuda, present this, their petition for a writ of certiorari, and state:

I PARTIES TO THE PROCEEDING

All parties to this action are listed in the caption. There are no parent or affiliated companies, nor any corporation or other entity that has a financial interest in the outcome as shown by the disclosure filed in the United States Court of Appeals for the Sixth Circuit which states as follows:

> Pursuant to Sixth Circuit Rule 25, Thomas Cuda and Claudia S. Cuda, by and through their attorney, Carl L. Reagh, make the following disclosures:
>
> 1. Are said parties a subsidiary or affiliate of a publicly owned corporation? NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

Dated this 24th day of August, 1991

s/Carl L. Reagh
Carl L. Reagh
Attorney for Plaintiffs/Appellants

II Reports Of Opinions

1. Opinion from the United States District Court for the Western District of Michigan granting summary judgment dated April 2, 1991.

2. Opinion from the United States Court of Appeals for the Sixth Circuit affirming the district court's final judgment dated February 3, 1992. (Unpublished)

III Grounds For Jurisdiction

This Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit is filed pursuant to Rule 13 of the Rules of the Supreme Court of the United States.

A final judgment was entered by the United States District Court for the Western District of Michigan on April 2, 1991.

This Judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on February 3, 1992.

Petitioners believe that 28 U.S.C. Section 1254 (c) confers jurisdiction to review the Judgment in question by a writ of certiorari.

IV Statutes And Regulations Involved

The following statutes are involved:

"(a) GENERAL RULE. — Returns and return information shall be confidential, and except as authorized by this title —

(1) no officer or employee of the United States, shall disclose any return or return information obtained by him in any manner in connection with his service as such officer or an employee or otherwise or under the provisions of this section." 26 U.S.C. Section 6103 (a).

"An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise available — with respect to the enforcement of any other provision of this title. Such disclosure shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation." 26 U.S.C. Section 6103 (k) (6).

The following Treasury Regulations are involved:

"In connection with the performance of official duties relating to any examination, collection activity, civil or criminal investigation, enforcement activity, or other offense under the internal revenue laws, — an officer or employee of the Internal Revenue Service — is authorized to disclose taxpayer identity information (as defined in

section 6103 (b) (6)), — where necessary in order to properly accomplish any activity described in subparagraph (6) of paragraph (b) of this section. Disclosure of taxpayer identity information to a person other than the taxpayer to whom such taxpayer identity information relates or such taxpayer's legal representative for the purpose of — properly accomplishing such activities as authorized by this paragraph should be made, however, only — if such activities cannot otherwise properly be accomplished without making such disclosure." 26 C.F.R. Section 301.6103 (k) (6) –1 (a).

"In connection with the performance of official duties relating to any examination, collection activity, civil or criminal investigation, enforcement activity, or other offence under the internal revenue laws, an officer or employee of the Service — is authorized to disclose return information (as defined in section 6103 (b) (2) in order to obtain necessary information relating to the following —

★ ★ ★ ★ ★ ★ ★ ★ ★ ★

(6) To establish or verify the financial status or condition of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described in paragraph (3) of this paragraph to be collected or otherwise to apply the provisions of the Code relating to establishment of liens against such assets, or levy on, or sale of, the assets to satisfy such liability, or

★ ★ ★ ★ ★ ★ ★ ★ ★ ★

Disclosure of return information to a person other than the taxpayer to whom such return information relates or such taxpayer's legal representative for the purpose of — properly accomplishing any activity described in subparagraph (6) of this paragraph, should be made,

however, only — if the activities described in subparagraph (6) of this paragraph cannot otherwise be properly accomplished without making such disclosure." 26 C.F.R. Section 301.6103 (k) (6) –1 (b).

V Statement Of The Case

On March 12, 1991, Thomas J. Cuda and Claudia S. Cuda filed an action in the United States District Court for the Western District of Michigan, Southern Division, against the United States of America seeking, in Count I to Quiet Title to the Plaintiffs' property and seeking money damages for the unlawful disclosure of income tax information in Count II.

Count I of the Complaint was later dismissed as the Defendant collected the amount claimed by levy and released the liens.

In Count II of the Complaint the Plaintiff alleged that the Defendant had served Notices of Levy forms on many people " — whose only connection with these Plaintiffs was that their residence address was on the same highway as these Plaintiffs." (p. A-3)

The Defendant, in response, filed a Motion to Dismiss and a Memorandum to which was attached a group of "Oil and Gas Leases" wherein certain individuals had leased oil and gas rights to Dr. Thomas Cuda, Trustee, and Claudia Cuda, Trustee of Dr. Thomas Cuda Trust.

In the Memorandum the Defendant stated only that:

"In the present case, the taxpayers entered into numerous leases with persons who allegedly turn out to be his neighbors. Like Timmerman, supra. the only way to find out whether these persons had assets belonging to the plaintiffs was to serve these persons with the Notice

of Levy. As such, there has not been a violation of Section 6101 (p. A-18)

The Plaintiffs filed a Memorandum in opposition to the Motion to Dismiss.

The District Court treated the Motion to Dismiss as a Motion for Summary Judgment and stated " — I believe that the notices were legitimately served for the purpose of collecting unpaid taxes. Accordingly I will enter judgment granting defendant's motion for summary judgment." (p. A-25)

Judgment was entered on April 2, 1991. Plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit who affirmed the judgment of the district court upon the opinion of the district court. (p. A-28)

VI ORIGINAL JURISDICTION

The United States District Court for the Western District of Michigan, Southern Division, had jurisdiction over this case under Section 1340 of Title 28 of the United States Code and Section 7402 of Title 26 of the United States Code.

VII ARGUMENT

I

SHOULD THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAVE AFFIRMED THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, IN GRANTING A MOTION FOR SUMMARY JUDGMENT AND FINDING, AS A MATTER OF LAW, THE DISCLOSURE OF INCOME TAX INFORMATION IN THE NOTICES OF LEVY WERE NECESSARY WITHOUT ANY EVIDENCE OR ALLEGATIONS TO SUPPORT THAT FINDING?

In the District Court's Opinion the Court stated:

"Because I have considered all papers filed with this Court in this matter and not limited myself to the pleadings, I will treat the motion as a summary judgment motion." (p. A-21)

Therefore, the Court was considering the "Oil and Gas Leases" which were attached to the Defendant/Respondent's Memorandum in Support of the Motion to Dismiss.

These leases should not have been considered as a part of the record as they were not identified in any way. The Defendant/Respondent, in the memorandum, stated "In this case, the taxpayers entered into numerous leases with persons, who allegedly turn out to be his neighbors." (p. A-18) There is no statement that the leases attached to the memorandum are the leases referred to in the memorandum or to identify the attached leases in any way.

If the Defendant/Respondent had intended the Court to believe that the attached leases were the leases referred to in the memorandum it should have so stated.

However, the Defendant/Respondent did not make any such statement but left the implication that the leases attached were the leases referred to in the memorandum. This implication was misleading. The leases attached were clearly not entered into by the Plaintiffs/Petitioners but were entered into by "Thomas Cuda, Trustee and Claudia Cuda, Trustee of Dr. Thomas Cuda Trust".

Therefore, if the leases attached were the leases referred to in the memorandum the statement of the Defendant/Respondent that " — the taxpayer entered into numerous leases with persons — " was not true.

Further, the provisions of the leases provided that the Dr. Thomas Cuda Trust leased certain oil and gas rights

from the various individuals. Therefore, any payment of money under the leases would be from the trust to the individuals and not from the individuals to the trust, much less to the Plaintiff/Petitioners individually. There was no provision in the lease whereby the individuals would owe any money, or any other asset, to the trust or to the individuals.

The Plaintiffs/Petitioners Memorandum in Opposition to the Defendant's Motion to Dismiss pointed out that the leases did not give rise to any reason to believe that the individuals would owe any money to the Plaintiffs/Petitioners.

The Court Rule provides as follows:

"(c) Motion for Judgment on Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for a judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such motion by Rule 56." Fed. Rules Civ. Proc. Rule 12 (c).

In this case the Defendant/Respondent did not file an Answer but raised the question of failure to state a claim upon which relief can be granted under Federal Rules of Civil Procedure Rule 12 (b) (6).

Therefore, the only material in the file at the time the Court granted the Motion for Summary Judgment was the Complaint, the Motion to Dismiss with Memorandum and attachments and the Plaintiffs/Petitioners' Memorandum in Opposition to the Motion to Dismiss.

The memorandums should not be considered as support for a summary judgment motion under Rule 56.

However, in this case the Court did consider, not only the Complaint, but the Memorandum filed by the Defendant/Respondent in which the claim was made that the Plaintiffs/Petitioners had entered into certain leases and " — In this case, the levies were served for the collection of taxes and no liability can result under Section 7431." (p. A-19)

The Court Rule provides that if matters outside the pleadings are presented and " — not excluded by the court — " the motion shall be treated as a Rule 56 Motion.

In this case the Court should not have considered the Defendant/Respondent's memorandum or the attached leases as having been presented but, if they were to be considered as presented, they should have been excluded.

The statements of the attorney for the Defendant/Respondent, contained in the memorandum, were not made on personal knowledge, did not set forth facts as would be admissible in evidence and did not show affirmatively that he was competent to testify to the matters stated therein. These statements should not have been considered according to Fed. Rules Civ. Proc. Rule 56 (c).

Further, the papers attached to the memorandum were not referred to in the memorandum, were not identified and were not sworn to or certified as required by Fed. Rules Civ. Proc. Rule 56 (c).

If the memorandum and attachments were considered by the District Court, as stated, it was improper for it to do so.

If the memorandum and attachments were not considered, the Defendant/Respondent would be left with only

the claim that the Plaintiff/Petitioner did not state a claim upon which relief can be granted.

If the memorandum and attachments were considered as having been presented and not excluded the Motion under Rule 56 still should not have been granted.

In a motion for summary judgment the court cannot try issues of fact but can only determine whether there are issues in dispute to be decided in a trial on the merits. Gutierrez vs. Lynch. 826 F 2nd 1534,1536 (6th Cir. 1987). The issue is whether there is sufficient evidence to show a disagreement that would require submission to a jury. Anderson vs. Liberty Lobby, Inc., 477 US 242, 251 — 52 (1986).

However any inference to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Electric Ind. Co. Zenith Radio Corp., 475 US 574, 587 (1986).

In this case the Plaintiffs/Petitioners alleged that the Defendant/Respondent disclosed income tax information pertaining to the Plaintiffs/Petitioners without any reason.

The Defendants/Respondents replied by stating in a Memorandum that the Plaintiff had entered into leases with the individuals involved and that the Notices of Levy were served for the collection of taxes.

On their face it appears that the leases did not involve the Plaintiff/Petitioners and would not, under any circumstances, give rise to any money to be owed to Plaintiffs/Petitioners. The Court should have found there was an issue in dispute to be decided on a trial without drawing any inference from the facts.

However, the District Court drew the inference that

there might be some reason to believe that the individuals might owe money to the Plaintiff and that if the Internal Revenue Service issued Notices of Levy they must have been attempting to collect taxes.

The Defendant/Respondents stated in the Memorandum
"In this case, the Levies were served for the collection of taxes and no liability can result under Section 7431."

The District Court stated that "I believe that the notices were legitimately served or the purpose of collecting unpaid taxes."

The Court of Appeals adopted the District Court opinion.

Therefore, the Defendants/Respondents stated, without any support, that the Levies were served for the collection of taxes and the District Court made a finding of fact that the notices were legitimately served for the purpose of collecting taxes.

The Internal Revenue Code provides that " — Returns and return information shall be confidential — " 26 U.S.C. Section 6103 (a). It then goes on to provide exceptions to the rule of confidentiality. One of the exceptions provides that an Internal Revenue Officer may disclose return information " — to the extent that such disclosure is necessary — " and " — under such conditions as the Secretary may prescribe by regulation — " 26 U.S.C. Section 6103 (k) (6).

The Secretary has prescribed regulations which allow an officer or employee of the Internal Revenue Service to disclose return information " — where necessary in order to properly accomplish any activity described in subparagraph (6) of paragraph (b) and further that such disclosure for the purpose of " — properly accomplishing

such activities as authorized by this paragraph should be made, however, only — if such activities cannot otherwise be accomplished without making such disclosure." Tres. Reg. Section 301.6103 (k) (6) –1 (a).

In this case the Plaintiffs/Petitioners stated, in the Complaint, as follows:

"6. When Nancy Carpenter mailed, or caused to be mailed, the "Notice of Levy" she knew or should have known that the persons to whom she mailed, or caused to be mailed, the notices had no connection with the Plaintiffs except the name of the highway on which they resided and that there was no reason to believe that those persons owed any money to these Plaintiffs." (p. A-3).

Further, the Complaint stated:

"10. Such unlawful disclosure was willful or the result of gross negligence." (p. A-4).

The Defendants/Respondents did not file an Answer but in response to the Complaint filed a Motion to Dismiss and in the Memorandum in support of that Motion stated:

"The revenue officer assigned to collect the plaintiffs' tax liabilities for those years — sought the issuance and service of the notices of levy to determine whether these individuals had any property belonging to the Plaintiffs pursuant to the leases." (p. A-8). The leases attached to the memorandum did not involve the Plaintiffs and did not contain any provision where the individuals might have any property belonging to the plaintiffs.

The Defendant/Respondent also stated in the memorandum that " — the only way to find out whether these persons had assets belonging to the plaintiffs was to serve these persons with the Notices of Levy. As such, there has not been a violation of Section 6103" (p. A-18)

and " — in this case, the levies were served for the collection of taxes and no liability can result under Section 7431." (p. A-19)

These statements, in a Memorandum in Support of Motion to Dismiss are not supported by evidence of any kind in the file. The statements of counsel, contained in a memorandum, should not be considered as sufficient to establish the facts contained in such statements.

With the Plaintiffs/Petitioners statement in the Complaint, which was certified by one of the Plaintiffs, that such disclosures were wilfull or the result of gross negligence an issue of fact was raised. The Defendant/Respondent did nothing to contradict that statement.

The District Court found that " — I believe that, like in Timmerman, the I.R.S. agent was attempting to find out whether the individuals had assets belonging to the plaintiffs and the only way to do this was to serve these people with the Notices of Levy." (p. A-25) and further " — I believe that the notices were legitimately served for the purpose of collecting unpaid taxes." (p. A-25)

The District Court was not making a finding of law when it stated that it "believed" that the notices were legitimately served but instead was making a finding of fact based on the statements of counsel in a memorandum as opposed to the certified statement of one of the Plaintiffs/Petitioners in the Complaint.

In the opinion of Plaintiffs/Petitioners the District Court had to make a finding of fact before it could grant the summary judgment.

The Plaintiffs/Petitioners alleged that the disclosure was without reason and that it was either wilfull or the result of gross negligence.

The Defendant/Respondent did nothing to contradict this allegation except the unsupported statements in the memorandum that the revenue officer sought to determine whether these individuals had any property belonging to the plaintiffs and that the only way to find out was to serve the levies.

There is nothing in the file, even considering the memorandum and attachments, to give any reason to believe that these people might have any assets belonging to the Plaintiffs/Petitioners.

The Internal Revenue Code provides that income tax returns and return information are confidential. 26 U.S.C. Section 6103 (a) The only exception to that rule that pertains to this case is when such disclosure is necessary or when the activity cannot otherwise be accomplished without making such disclosures. 26 U.S.C. 6103 (k) (6)

The District Court found that the Internal Revenue Service agent was attempting to find out if these people had assets belonging to the Plaintiffs/Petitioners and that the notices were legitimately served.

The Plaintiffs/Petitioners believe that the Internal Revenue Service agent could have accomplished the purpose by simply reading the leases that were in her possession and which clearly indicated that the Plaintiffs/ Petitioners were not involved.

The Internal Revenue Code prohibits the disclosure of income tax returns or return information by an employee of the Internal Revenue Service and then provides an exception where necessary and where the results cannot be otherwise reasonably accomplished. There was nothing in this case to show that the disclosures were made pursuant to that exception.

The standards for considering a Motion for Summary Judgment require that the non-moving party be given the benefit of any inference to be drawn from the underlying facts. Matsushita Electric Ind. Co. vs. Zenith Radio Corp. 475 U.S. 574, 587 (1986). The District Court not only did not give the Plaintiffs/Petitioners the benefit of any reasonable inference but, actually, gave the moving party the benefit of any inferences that might be drawn.

II

DID THE DISTRICT COURT ERR IN CONSIDERING THE DEFENDANT/RESPONDENT'S MOTION AS A SUMMARY JUDGMENT MOTION WITHOUT GIVING THE PLAINTIFFS/PETITIONERS OPPORTUNITY FOR DISCOVERY?

The motion filed by the Defendant/Respondent was entitled "United States Motion to Dismiss or for Summary Judgment." The body of the motion stated:

"The United States of America, by and through its attorney, John A. Smietanka, United States Attorney for the Western District of Michigan, pursuant to Rules 12(b) and (c) of the Federal Rules of Civil Procedure, moves this Court to dismiss the above-captioned action or for the entry of judgment in favor of the United States and against the plaintiffs.

In support of its motion, the United States relies on the supporting memorandum of law being filed concurrently herewith." (p. A-6)

Other than the memorandum with attachments no other material was presented to the court.

The memorandum filed with the motion was entitled "United States Memorandum of Law in Support of United

States Motion to Dismiss". At the conclusion of the memorandum the Defendant/Respondent stated:

"For the reasons stated herein, the United States has not waived its sovereign immunity and the plaintiffs have failed to state a claim upon which relief may be granted." (p. A-19)

At no time in the memorandum does the Defendant/Respondent refer to any issue that would convert the motion to a motion for a summary judgment. The Defendant/Respondent clearly intended this to be a Motion to Dismiss.

The District Court, in its opinion, stated:

"Because I have considered all papers filed with this Court in this matter and not limited myself to the pleadings, I will treat this motion as a summary judgment motion." (p. A-21)

The Court Rule states:

" — If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." Fed. Rule Civ. Proc. Rule 12 (b).

Further the rule states:

"(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not

excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. Rule Civ. Proc. Rule 12 (c).

Thus, both Rule 12 [b] and (c) contain identical language.

The District Judge stated in his opinion that he considered all "papers" that were filed with the court. Therefore, it appears that he was considering the memorandum. The Plaintiffs/Petitioners do not believe that the memorandum should have been considered and believe that it, and the attached papers, should have been excluded by the court.

However, if the court was going to consider all the "papers" filed with the court then the Plaintiffs/Petitioners should have been given reasonable opportunity to present " — all material made pertinent to such motion by Rule 56."

Rule 56 (c) states that "— the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of fact and that the moving party is entitled to a judgment as a matter of law." Fed. Rules Proc. Rule 56 (c). In this case there were no depositions, answers to interrogatories, admissions or affidavits on file.

The District Court considered all "papers" in the file and converted the motion to a Rule 56 motion and then granted the motion.

Under any circumstances Rule 12 would require the court to give all parties reasonable opportunity to present

all material made pertinent to such motion by Rule 56. This is even more compelling when the "papers" considered by the court were not any of the documents listed in Rule 56 (c) that could be considered by the court.

Plaintiffs/Petitioners believe that the District Court erred in considering "papers" that should have been excluded and, also, erred in not allowing Plaintiffs/Petitioners an opportunity to present material pertinent to a Rule 56 Motion.

CONCLUSION

The Internal Revenue Code provides that income tax returns and return information are confidential. 26 U.S.C. Secton 6103 (a). However, there is an exception made in the case of Internal Revenue agents or employees where such disclosure is necessary. 26 U.S.C. Section 6103 (k) (6). Treasury Regulations provide that disclosure can be made only if the activities cannot otherwise properly be accomplished without making such disclosure. 26 C.F.R. Section 301.6103 (k) (6) –1 (a).

In this case the Complaint alleged that there was no reason to make such disclosure and that the disclosure was wilfull or the result of gross negligence.

There was no answer filed denying such allegations nor were there any affidavits, answers to interrogatories, admissions or other documents in the file to refute those allegations.

The District Court found that the notices were legitimately served for the purpose of collecting unpaid taxes.

The Court could not have been making a finding of fact so it must have found, as a matter of law, that any Notice of Levy was legitimate and so, therefore, would be

within the exception to the confidentiality rule.

In order to make this finding the Court must either have ignored the basic rule of confidentiality of this information or granted to the Internal Revenue Service a complete exception to the rule regardless of whether or not there was any reason for the disclosure and whether or not the disclosure was made in any attempt to accomplish a purpose under the Internal Revenue Code.

When the United States Court of Appeals for the Sixth Circuit adopted the opinion of the District Court they were deciding an important question of federal law that has not been, but should be, settled by this Court.

Defendant/Respondent filed a Motion to Dismiss under Federal Rules Civil Procedure 12 (b) or (c). There was nothing in the file that could have been properly considered by the Court except the Complaint. However, the District Court stated that he considered all "papers" in the file and treated the motion as a summary judgment motion under Rule 56.

Both Rule 12 (b) and (c) allow the District Court to consider the matter as one for summary judgment but both also, provide that all parties shall be given reasonable opportunity to present all material facts made pertinent by Rule 56.

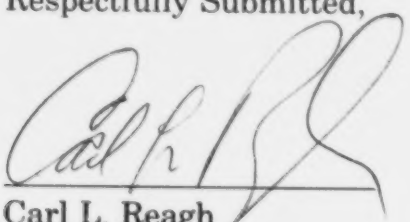
The District Court did not give counsel any notice that he was going to consider the motion as a Summary Judgment motion and the first notice that the motion was going to be treated as a Summary Judgment motion was the order granting the Summary Judgment.

Therefore, the District Court did not give all parties opportunity to present any material made pertinent by Rule 56.

In adopting the District Court's opinion the United States Court of Appeals for the Sixth Circuit sanctioned a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of the United States Supreme Court's power of supervision.

Wherefore, Petitioners request that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,



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Dated: Lansing, Michigan
May, 1992

NUMBER

SUPREME COURT OF THE UNITED STATES

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THOMAS J. CUDA AND CLAUDIA S. CUDA,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS J. CUDA and CLAUDIA S. CUDA,	COMPLAINT
Plaintiffs	Case No.
vs.	HON.
UNITED STATES OF AMERICA, Defendant	

NOW COME the Plaintiffs, Thomas J. Cuda and Claudia S. Cuda, by Carl L. Reagh, their attorney, and for Complaint against the Defendant, United States of America, say as follows:

COUNT ONE — QUIET TITLE

1. Plaintiffs are residents of the County of Eaton, State of Michigan, within the jurisdiction of this Court.

2. The Defendant, United States of America, claims a lien against all property belonging to the Plaintiffs or in which the Plaintiffs have any interest arising out of a claimed amount due for "tax period" ending December 31, 1980.

3. Such claimed lien is invalid because no lawful and proper assessment has ever been made against these Plaintiffs as required by the Internal Revenue Code, Section 6203.

4. Such claimed lien is invalid because no Notice and Demand has ever been made against these Plaintiffs as

required by the Internal Revenue Code, Section 6303 (a).

5. If any attempt was made to make an assessment against these Plaintiffs it was done after the expiration of the limitation period contained in the Internal Revenue Code, Section 6501 (a).

6. The Defendant, United States of America, claims a lien against all property belonging to the Plaintiffs or which the Plaintiffs have any interest arising out of a claimed amount for the "tax period" ending December 31, 1985.

7. Such claimed lien is invalid because no lawful and proper assessment has ever been made against these Plaintiffs as required by the Internal Revenue Code, Section 6203.

8. Such claimed lien is invalid because no Notice and Demand has ever been made against these Plaintiffs as required by the Internal Revenue Code, Section 6303 (a).

9. If any attempt was made to make an assessment it was done after the expiration of the limitation period contained in the Internal Revenue Code, Section 6501 (a).

10. Defendant has attempted to levy against property belonging to these Plaintiffs.

WHEREFORE, the Plaintiff respectfully requests that this Court:

A. Enter an Order declaring that the claimed liens are invalid.

B. Enter an Order declaring that the Plaintiff hold title to all of their property free and clear of any claim by the United States of America.

C. Enter an Order restraining the United States of America from any further attempts to seize the Plaintiffs' property.

D. Award to the Plaintiffs such other relief as may be deemed appropriate.

COUNT TWO — UNLAWFUL DISCLOSURE

1. Plaintiffs are residents of the County of Eaton, State of Michigan, within the jurisdiction of this Court.

2. That on or about February 27, 1990, Nancy Carpenter was an employee of the Lansing office of the Internal Revenue Service,

3. On or about February 27, 1990, Nancy Carpenter did serve, or cause to be served, many forms entitled "Notice of Levy" on various individuals whose only connection with these Plaintiffs was that their residence address was on the same highway as these Plaintiffs.

4. Such "Notice of Levy" contained the Plaintiffs' names, Thomas Cuda's social security number, the Plaintiffs' address and details of alleged "unpaid balance of assessment" and "statutory additions" concerning "kind of tax – 1040" for the year ending "12-31-80" and "12-31-85".

5. When Nancy Carpenter mailed, or caused to be mailed, the "Notice of Levy" she knew or should have known that the United States of America did not have any claim against these Plaintiffs because the claimed amount had not been properly assessed against these Plaintiffs, the proper Notice and Demand had not been made and the limitation period had expired.

6. When Nancy Carpenter mailed, or caused to be mailed, the "Notice of Levy" she knew or should have known that the persons to whom she mailed, or caused to be mailed, the notices had no connection with the Plaintiffs except the name of the highway on which they resided and that there was no reason to believe that those persons

owed any money to these Plaintiffs.

7. Plaintiffs do not know how many of these "Notice of Levy" forms were mailed out but believe that the number was in excess of thirty (30).

8. Such mailing of the "Notice of Levy" to persons who were not associated with these Plaintiffs in any way constituted a violation of the confidentiality of return and return information as set forth in the Internal Revenue Code, Section 6103 (a).

9. The information contained on the "Notice of Levy", even if the levies were proper, constituted a violation of the confidentiality of return and return information because it contained information that was not necessary in violation of the Internal Revenue Code, Section 6103 (k) (6).

10. Such unlawful disclosure was wilful or the result of gross negligence.

WHEREFORE, the Plaintiffs pray that this Court enter a Judgment against the Defendant and in favor of the Plaintiffs in an amount pursuant to the provisions of the Internal Revenue Code, Section 7431 (c).

Carl L. Reagh
Attorney for Plaintiffs
Business Address
3615 Bayview – 86
Lansing, Michigan 48911

(517) 887-6240

Dated: Lansing, Michigan
February 8, 1990

I certify under penalty of perjury that the foregoing is true and correct.
Executed under penalties of perjury this _____ day of March, 1990.

_____
Thomas J. Cuda

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS J. CUDA and
CLAUDIA S. CUDA,

Plaintiffs,

v.
UNITED STATES OF,
AMERICA
Defendant.

CIVIL NO. 5: 90CV-17
HON. RICHARD A.
ENSLEN

UNITED STATES' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

The United States of America, by and through its attorney, John A. Smietanka, United States Attorney for the Western District of Michigan, pursuant to Rules 12(b) and (c) of the Federal Rules of Civil Procedure, moves this Court to dismiss the above-captioned action or for

the entry of judgment in favor of the United States and against the plaintiffs.

In support of its motion, the United States relies on the supporting memorandum of law being filed concurrently herewith.

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64/MOT. CUDA

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS J. CUDA and
CLAUDIA S. CUDA,
Plaintiffs,

v. CIVIL NO. 5: 90CV-17

UNITED STATES OF AMERICA HON. RICHARD ENSLEN

Defendant.

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

The United States of America, by and through its attorney, John A. Smietanka, United States Attorney for the Western District of Michigan, herewith submits its memorandum of law in support of the United States' motion to dismiss filed contemporaneously herewith.

QUESTIONS PRESENTED

1. Whether the plaintiffs have stated a case or controversy.

2. Whether the United States has waived its sovereign immunity to be sued?

STATEMENT OF FACTS

On March 12, 1990, the plaintiffs filed the present action, seeking to quiet title in their property, which the Internal Revenue Service has allegedly levied upon. The plaintiffs assert that pursuant to 28 U.S.C. Section 2410, this Court has jurisdiction to hear this matter. The United States submits the Court does not. Further, the plaintiffs allege that the United States violated 26 U.S.C. 6103.

With respect to the disclosure allegation, the plaintiffs allege that the United States has issued and served numerous Notices of Levy. The plaintiffs claim that the individual persons to whom the notices of levy were served were his neighbors.[1] The United States admits that it issued and served notices of levy (see Exhibit A). These Notices of Levy were based on the plaintiffs' failure to pay taxes for the years 1980 and 1985. They were also based on oil and gas leases entered into between the plaintiffs, as lessees, and those individuals whom the plaintiffs claim were their neighbors, as lessors (see Exhibit B). The revenue officer assigned to collect the plaintiffs' tax liabilities for those years, which liability has subsequently been collected in full (see Exhibit C), sought the issuance and service of the notices of levy to determine whether these individuals had any property belonging to the plaintiffs pursuant to the leases.

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[1] Although the United States does not know the validity of this allegation, the allegation must be assumed by the Court to be true for purposes of this motion only. Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965).

ARGUMENT

I

THE PLAINTIFF HAS RAISED A MOOT ISSUE

In the present case, the plaintiffs' complaint fails to comply with Article III, Section 2 of the United States Constitution, which provides:

> The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; — to Controversies to which the United States shall be a Party;

In Preiser v. Newkirk, 422 U.S. 395 (1975), the Supreme Court held that the exercise of judicial power under the Constitution depended on the existence of a controversy. A controversy is one that is appropriate for judicial determination, that is definite and concrete, touching legal relations of parties having adverse legal interests, and be a real and substantial controversy admitting of specific relief through a decree of conclusive character. Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, Mo., 300 U.S. 227 (1937). Abstract injury is not sufficient to warrant assumption of jurisdiction by a federal court; there must be an allegation by the plaintiff that he has sustained or is in immediate danger of sustaining some direct injury. O'Shea v. Littleton, 414 U.S. 488 (1974). The injury must be real and not conjectural or hypothetical. O'Shea, supra. In Toth v. United Auto. Aerospace and Agr. Implement Workers of America UAW, 743 F. 2d 398 (6th Cir. 1984), the Sixth Court of Appeals stated that Article III required the plaintiff to show that he personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,

and that injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.

In the present case, the plaintiffs have sued the United States to quiet title pursuant to Section 2410. The problem is that pursuant to 26 U.S.C. Sections 6321 and 6322, the United States' lien is no longer existent since the plaintiffs' tax liablility has been paid in full. Therefore, since there is no lien, there is no controversy to decide with respect to quieting title. The controversy must exist throughout each stage of the litigation and not merely at the time of the commencement of the case; i.e., time the complaint is filed. Eckl v. City of Boston, 476 F. Supp. 1014 (D. Mass. 1979); Waide, III v. Waller, 402 F. Supp. 922 (N.D. Miss. 1975). See also, Wiley v. National Collegiate Athletic Association, 612 F. 2d 473 (10th Cir. 1979) (actual controversy must exist at stages of appellate or certiorari review and not simply at the date the action is initiated); Brooks v. Cousins, 527 F. 2d 472 (4th Cir. 1975).

In County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), the Court stated:

> [J]urisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur [and] (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Since the lien has been removed from the plaintiffs' property the once existent controversy is now moot.

II

THERE HAS BEEN NO WAIVER OF SOVEREIGN IMMUNITY TO THIS ACTION UNDER SECTION 2410

In addition to the fact that there is no case or controversy, the United States has not waived its sovereign immunity to sued under the facts of this case. It is well established that the United States, as a sovereign, may be sued only to the extent that it has consented to suit by statute. United States v. Testan, 424 U.S. 392, 399 (1976); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); United States v. Sherwood, 312 U.S. 584 (1941); United States v. Shaw, 309 U.S. 495 (1940). A waiver of this immunity cannot be implied, but must be explicit, Soriano v. United States, 352 U.S. 270, 176 (1957); Honda v. Clark, 386 U.S. 484, 501 (1967). Where there is no statute expressly waiving the sovereign immunity of the United States, dismissal of the action is required. Stout v. United States, 229 F. 2d 918 (2nd Cir.), cert. denied, 351 U.S. 982 (1956); Frasier v. Hegeman, 607 F. Supp. 318, 322 (N.D.N.Y. 1985); Jules Hairstylists of Md., Inc. v. United States, 268 F. Supp. 511, 514 (Md. 1967), aff'd per curiam, 389 F. 2d 389 (4th Cir.), cert. denied, 391 U.S. 934 (1968).

In the present action, the plaintiffs claim that this is a quiet title action under 28 U.S.C. Section 2410(a). They sought declaratory relief against the United States, which would have the effect of preventing it from collecting income tax assessments from them. It is believed that the plaintiffs are not challenging the merits of the paid underlying income tax liability, but rather, the procedural

validity of the assessments.[2] They assert those contentions by alleging that (1) the determination of the liability was procedurally deficient because a deficiency determination was not made, and, thus the United States had no power to seize "the property" (paragraph 6 of complaint); (2) the Government failed to give proper notice and demand for payment for unknown tax years (paragraphs 7 and 8 of complaint) and (3) that "the Secretary of Treasury did not delegate the authority to each of the persons involved in the processes as set forth above" (paragraph 9 of complaint).

The purpose of 28 U.S.C. Section 2410 is to give property owners and other lienholders or mortgagees a means for removing clouds upon title to property. Falik v. United States, 343 F. 2d 38 (2d Cir. 1965). The statute provides for a limited waiver of sovereign immunity. As a waiver of sovereign immunity, the statute must be strictly construed. United States v. Sherwood, 312 U.S. 584.

Assuming that 28 U.S.C. Section 2410 would have been applicable in the instant action, pursuant to 28 U.S.C. Section 2410 (b), the plaintiffs must state the following:

> (b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the

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[2] If this assumption is inaccurate, then this action is precluded by Section 7422 of the Internal Revenue Code, since the plaintiffs have failed to file a claim for refund. Flora v. United States, 362 U.S. 145 (1960); Pollack v. United States, 819 F. 2d 144 (6th Cir. 1987).

> name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. (emphasis added.)

This language must be construed conservatively. United States v. Sherwood, 312 U.S. 584, 590 (1941). Where sovereign immunity is waived subject to a condition imposed by Congress, such condition must be adhered to strictly without exception. United States v. John Hancock Mutual Life Insurance Company, 364 U.S. 301 (1960) Soriano v. United States, 352 U.S. 270, 276 (1957).

Section 2410 (a) specifically provides that the party seeking to sue the United States pursuant to Section 2410 must comply with all conditions set forth in Section 2410. In the present action, the plaintiff has failed to comply with any of the requirements of paragraph (b). Therefore, the United States has not waived its soveriegn immunity and this Court lacks jurisdiction. City Bank of Anchorage v. Eagleston, 110 F. Supp. 429 (D.Ak. 1953).

III

PLAINTIFF HAS FAILED TO STATE A CLAIM UNDER 26 U.S.C. Section 7431

Section 7431 (a) (1) of the Internal Revenue Code provides:

> If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of

> section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

To prevail, then, under Section 7431 (a), the plaintiff must demonstrate, by a preponderance of the evidence, (1) that the disclosures were unauthorized, (2) that the United States made the disclosure either "knowingly or by reason of negligence" and (3) that the disclosure was in violation of Section 6103. Flippo v. United States, 670 F. Supp. 638, 641 (W.D.N.C. 1987), aff'd 849 F. 2d 604 (4th Cir. 1988); William E. Schrambling Accountancy Corp., v. United States, 689 F. Supp. 1001, 1006 (N.D. Cal. 1988). In addition, pursuant to Section 7431 (b) of the Internal Revenue Code the plaintiff must also allege facts demonstrating that the disclosure was in bad faith, for failure to so allege results in automatic dismissal of the complaint. Davidson v. Brady, 732 F. 2d 552 (6th Cir. 1984).[3]

The Tax Reform Act of 1976, as amended, Pub. L. 94-455, 90 Stat. 1687, provides that federal tax return information is , with certain exceptions, confidential. Davidson, supra. Church of Scientology of California v. Internal Revenue Service, 489 U.S. 9 (1987). Section 6103 (a) of the Internal Revenue Code provides:

> Returns and return information shall be confidential, and except as authorized by this

[3] The United States submits that the allegations of Count II of the plaintiffs' complaint, in light of the facts as presented herein, does not amount to an allegation of "bad faith" on the part of the revenue officer. As such, for this reason alone Count II of the complaint must be dismissed.

title — '(1) no officer or employee of the United States, ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

(b) No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

Section 6103 (k) (6) provides:

An internal revenue officer or employee may, in connection with his official duties relating to any . . . , collection activity, . . . disclose return information to the extent that such disclosure is

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[4] Return information is defined in section 6103 (b) (2) as follows:

(2) Return Information. The term 'return information' means —

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other date, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written document relating to such written determination . . . which is not open to public inspection under section 6110, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer . . .

> necessary in obtaining information, which is not otherwise reasonably available, with respect to . . . , or the amount to be collected . . . Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

Treasury Regulations (26 C.F.R.) § 301.6103 (k) (6) –1 states:

> In connection with the performance of official duties relating to any . . . collection activity, . . . an officer or employee of the Internal Revenue Service . . . . is authorized to disclose taxpayer identity information . . . , the fact that the inquiry pertains to the performance of official duties, and the nature of the official duties in order to obtain necessary information relating to performance of such official duties or where necessary in order to properly accomplish any activity described in subparagraph (6) of paragraph (b) of this section.
>
> ★ ★ ★ ★ ★ ★ ★ ★ ★ ★
>
> (b) (6) . . . to locate assets in which the taxpayer has an interest, . . . or otherwise to apply the provisions of the Code relating to the establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy any such liability;

In enacting Section 6103, Congress "sought to balance this interest ["expectation of privacy"] against the legitimate need of the Government to use the information for other purposes." Flippo v. United States, 670 F. Supp. 638, 642 (W.D.N.C. 1987); see also, Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, 94th Cong., 2nd Sess. at 314-315 [1976-3 Cum.

Cum. Bull. (Vol. 2) 326-327]. In making this balance, Section 7431 was not intended to interfere with the collection activities of the Internal Revenue Service in their efforts to collect delinquent taxes. Flippo, supra; Traxler v. United States, 88-2 U.S.T.C. ¶ 9627 (E.D. Cal. 1988). As stated in Flippo, supra, at page 642:

> Here, "reasonable expectation of privacy" is not an issue as any reasonable expectation of the Plaintiff was protected by internal procedures pursuant to the collection activity here authorized by the Internal Revenue Code and thereby excepted from Section 6103. (emphasis in original.)
>
> Congress did not intend to impede the ability of the Internal Revenue Service to collect tax liabilities. The purpose of Section 7431 is fully met by the express terms of Section 6103 which specifically restricts its applicability to disclosures which are not otherwise authorized under the Internal Revenue Code.
>
> This interpretation strikes a balance between the "reasonable expectation of privacy" and the Government's legitimate interest in disclosing tax return information as necessary to effectuate specified tax administration functions. As the legislative history indicates, the striking of such a balance was precisely what Congress was attempting to do in enacting the disclosure provisions. See Staff of Joint Comm. Int. Rev. Tax, 94th Cong., 2nd Sess., General Explanation of the Tax Reform Act of 1976, at 314-315, 1976-3 C.B. (Vol. 2) 326-327.

Since the notices of levy in this case were served pursuant to legitimate collection activities, they do not violate Section 6103. In Timmerman v. United States, 44 AFTR 2d 79-5727 (D. Mn. 1979) (copy attached), the court held

that even when the notice of levy was served on an entity which the Internal Revenue Service should have known had no property interests of the taxpayer, the service was not a violation of Section 6103. In Timmerman, supra, the Internal Revenue Service had mistakenly put motor vehicle information, obtained from a state department of motor vehicles, of an unrelated person in the file of the taxpayer. Based on that mistaken information, the revenue officer issued a notice of levy to a bank, which according to the Department of Motor Vehicle files had a lien on a motor vehicle. After receiving the notice of levy, the bank replied it had no property of the taxpayer. Subsequently, the taxpayer brought an action claiming the Internal Revenue Service had violated Section 6103, by disclosing to the bank return information, as defined in Section 6103 (b) (2). Although the court agreed that the Internal Revenue Service had used incorrect information that they should have known about, the court went on to state (at page 79-5731):

> the only way the IRS could find out if the bank in question, or any bank, had property belonging to them [the taxpayer] was to serve the Notice of Levy.

In the present case, the taxpayer entered into numerous leases with persons, who allegedy turn out to be his neighbors. Like Timmerman, supra, the only way to find out whether these persons had assets belonging to the plaintiffs was to serve these persons with the Notices of Levy. As such, there has not been a violation of Section 6103. [5]

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[5] Any claims that the issuance and recording of the notice of federal tax liens violates Section 6103 has been found meritless. See, Bator v. Department of Treasury et. al., 89-1 U.S.T.C. ¶ 9138 (D. Nev. 1988) (copy attached); Maisano III v. United States, 89-2 U.S.T.C. ¶ 9558 (D. Nev. 1989) (revenue officers authorized to disclose return information in a notice of federal tax lien, because disclosure is necessary to achieve the purpose of notice (see § 6103 (k) (6), also, the same rule applies to notices of levy; copy attached).

In Traxler v. United States, supra, computer errors by the Internal Revenue Service caused the assessment of taxes and the issuance of levies. The Court rejected plaintiff's argument that the levies resulted in the unauthorized disclosure of return information. Citing to the Flippo, case, the court stated:

> Because the assessment and levies were authorized, albeit erroneously, § 7431 is not available. Liability is not imposed for erroneous disclosure, but only for disclosure which is unauthorized.

Id., at page 89-580. The court went on to state,

> There can be no liability so long as the disclosures were made for the bona fide purpose or effecting collection of taxes.

Id. In this case, the levies were served for the collection of taxes and no liability can result under Section 7431.

CONCLUSION

For the reasons stated herein, the United States has not waived its sovereign immunity and the plaintiffs have failed to state a claim upon which relief may be granted. As such, the Court lacks jurisdiction and the complaint should be dismissed.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MICHIGAN

THOMAS J. CUDA
and
CLAUDIA S. CUDA,

Plaintiffs,

v. File No. 5:90CV-17

UNITED STATES OF AMERICA
Defendant.

OPINION

This matter is before the Court on defendant's motion to dismiss or for summary judgment. Defendant brings its motion pursuant to Fed. R. Civ. p. 12 (b) and (c).

FACTS

On March 12, 1990, plaintiffs filed the present action containing two counts. Count One seeks to quiet title in plaintiffs' property, which the Internal Revenue Service ("IRS") has allegedly levied upon. Count Two alleges unlawful disclosure on the part of defendant in violation of 26 U.S.C. § 7431. Plaintiffs allege that the United States issued and served numerous Notices of Levy on plaintiffs' neighbors. The United States admits that it issued and served Notices of Levy based on the plaintiffs' failure to pay taxes for the years 1980 and 1985. These notices were

based on oil and gas leases entered into between plaintiffs as lessees, and individuals whom the plaintiffs claim were neighbors, as lessors. The United States asserts that the revenue officer assigned to collect the plaintiffs' tax liabilities sought the issuance and service of the Notices of Levy in order to determine whether the individuals had any property belonging to the plaintiffs pursuant to the leases.

STANDARD

Defendant has filed this motion pursuant to Fed R. Civ. P. 12 (b) and (c). Under a Rule 12 (b) motion, the Court must limit its inquiry to the pleadings. However, "if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . " Fed. R. Civ. P. 12 (c). Because I have considered all papers filed with this Court in this matter and not limited myself to the pleadings, I will treat the motion as a summary judgment motion.

Motion for Summary Judgment

In reviewing a motion for summary judgment, this Court should only consider the narrow questions of whether there are "no genuine issues as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). On a Rule 56 motion, the Court cannot try issues of fact, but is empowered to determine only whether there are issues in dispute to be decided in a trial on the merits. Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987); In re Atlas Concrete Pipe, Inc., 668 F. 2d 905, 908 (6th Cir. 1982). The crux of the motion is "whether the evidence presents a sufficient disagreement to require submission to a jury

or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986); see Booker v. Brown & Williamson Tobacco Co., Inc., 879 F. 2d 1304, 1310 (6th Cir. 1989).

A motion for summary judgment requires this Court to view "'inferences to be drawn from the underlying facts . . . in the light most favorable to the party opposing the motion.'" Matsushita Electric Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)), quoted in Historic Preservation Guild of Bay View v. Burnley, 896 F. 2d 985, 993 (6th Cir. 1989). The opponent, however, has the burden to show that a "rational trier of fact [could] find for the non-moving party [or] that there is a 'genuine issue for trial.'" Historic Preservation, 896 F. 2d at 993 (quoting Matsushita, 475 U.S. at 587).

As the Sixth Circuit has recognized and heartily supported, recent Supreme Court decisions have encouraged the granting of summary judgments. Historic Preservation, 896 F. 2d at 993 (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). Courts have noted that the summary judgment motion may be an "appropriate avenue for the 'just, speedy and inexpensive determination' of a matter." Cloverdale Equipment Co. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir. 1989) (quoting Celotex, 477 U.S. at 327). Consistent with the concern for judicial economy, "the mere existence of a scintilla of evidence in support of the [non-moving party's] positions will be insufficient." Anderson, 477 U.S. at 252. "Mere allegations do not suffice." Cloverdale, 896 F.2d at 937. "[T]he party with the burden of proof at trial is obligated to provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact." Id.

DISCUSSION

Plaintiffs and defendant agree that the plaintiffs' tax liability has been paid in full and that upon payment of the tax liability the defendant's lien ceased to exist. As a result, Count One of plaintiffs' complaint which seeks to quiet title is now moot, and I need not address it further.

Section 7431 (a) (1) of the Internal Revenue Code provides that a taxpayer may bring a civil action for damages against the United States "if an officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to any taxpayer in violation of any provision of Section 6103." 26 U.S.C. § 7431 (a) (1). Section 7431 (b) provides that "No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103." Section 6103 (a) states that returns and return information are confidential and shall not be disclosed by any officer or employee of the United States unless authorized under the provisions of section 6103. Section 6103 (k) (6) provides that an internal revenue officer or employee may disclose return information to the extent that such disclosure is necessary in obtaining information, not otherwise reasonably available, with respect to determining tax liability. Such disclosures are to be made only if such situations and under such conditions as the Secretary may prescribe by regulation. Treasury regulations provide that an officer or employee of the Internal Revenue Service is authorized to disclose taxpayer identity information to "locate assets in which the taxpayer has an interest, . . . or otherwise to apply the provisions of the Code relating to the establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy any such liability." 26 C.F.R. §301.6103 (k) (6).

To prevail then, on a claim under § 7431 (a), plaintiffs must show (1) that the disclosure was unauthorized, (2) that the disclosure was made "knowingly or by reason of negligence" and (3) that the disclosure was in violation of § 6103. Flippo v. United States, 670 F. Supp 638, 641 (W.D.N.C. 1987), aff'd 849 F.2d 604 (4th Cir. 1988). In addition, pursuant to § 7431(b), plaintiffs must also allege facts demonstrating that the disclosure was in bad faith. Davidson v. Brady, 732 F. 2nd 552 (6th Cir. 1984).

Plaintiffs claim that the defendant released more tax or tax return information than necessary, when it knew or should have known that there was no reason to believe that such information would aid in the administration of the tax laws. Brief at 5 (pagination supplied by Court). Plaintiffs assert that there was no reason for any of the individuals served with Notices of Levy to owe money to the plaintiffs because the oil and gas leases in question provide for the payment of monies from "Dr. Thomas Cuda Trust" to the lessees if oil or gas was found on the property.

Defendant claims that since the Notices of Levy in this case were served pursuant to legitimate collection activities, there has been no violation of § 6103, and hence no violation of § 7431. In Timmerman v. Swenson, 44 AFTR 2d 79-5727 (D. Mn. 1979), the court held that even when a notice of levy was served on an entity which the IRS should have known had no property interests of the taxpayer, the service was not a violation of § 6103. In Traxler v. United States, 88-2 U.S.T.C. ¶9627 (E.D. Cal. 1988), computer errors by the IRS caused the assessment of taxes and the issuance of levies. The court rejected plaintiff's arguments that the levies resulted in the unauthorized disclosure of return information Citing to the Flippo case, the court stated:

> Because the assessment and levies were authorized, albeit erroneously, § 7431 is not available. Liability is not imposed for erroneous disclosure, but only for disclosure which is unauthorized . . . there can be no liability so long as the disclosures were made for the bona fide purpose of effecting collection of taxes.

Traxler, 88-2 U.S.T.C. at 85,991-2.

In this case, plaintiffs allege that the disclosures were "without reason." Brief at 3 (pagination supplied by Court). However, I believe that like in Timmerman, the IRS agent was attempting to find out whether the individuals had assets belonging to the plaintiffs, and the only way to do this was to serve these people with the Notices of Levy. Although plaintiffs allege in their complaint that proper notice and demand had not been made, they present nothing to support this allegation in response to defendant's motion. Of even more importance is the fact that plaintiffs do not allege that the notices were unauthorized. As such, no liability arises under § 7431 and plaintiffs have failed to show that a genuine issue of fact exists on the issue of defendant's service of Notices of Levy. I believe that the notices were legitimately served for the purpose of collecting unpaid taxes. Accordingly, I will enter a judgment granting defendant's motion for summary judgment.

Dated:

RICHARD A. ENSLEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

THOMAS J. CUDA
and
CLAUDIA S. CUDA,
Plaintiffs,

File No. 5:90-CV-17

v.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

In accordance with the opinion entered this date:

IT IS HEREBY ORDERED that defendant's motion to dismiss or for summary judgment is GRANTED.

DATED in Kalamazoo, MI:

RICHARD A. ENSLEN
U.S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS J. CUDA and
CLAUDIA S. Cuda,
Plaintiffs

NOTICE OF APPEAL

vs.

File No. 5:90 CV 17

UNITED STATES OF AMERICA,
Defendant

HON. RICHARD A. ENSLEN

NOTICE IS HEREBY GIVEN that Thomas J. Cuda and Claudia S. Cuda, the Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Order Granting the Defendant's Motion for Summary Judgment entered in this action on the 2nd day of May, 1991.

Carl L. Reagh
Attorney for Plaintiffs
7107 Medallion
Lansing, Michigan 48917

(517) 886-4526

Dated: Lansing, Michigan
May 28, 1991

Case No. 91-1640

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

O R D E R

THOMAS J. CUDA;
CLAUDIA S. CUDA
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA
Defendant-Appellee

BEFORE: MERRITT, Chief Judge; JONES and BATCHELDER, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is ORDERED that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk